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An exception to the general rule that a party will not be permitted to impeach his own witness is recognized by the Supreme Court of Vermont, in the recent case of State v. Slack, where it was held that the State may impeach its own witnesses in criminal cases, on account of the obligation resting on it to bring forward all witnesses obtainable for a criminal prosecution irrespective of their character. It is the established doctrine in that State that it is the duty of the prosecutor to produce and use all witnesses within reach of process of whatever character whose testimony will shed light upon the transaction under investigation, and aid the jury in arriving at the truth, whether it makes for or against the accused. That doctrine carried to its natural results exempts the State, in criminal cases, from the operation of the rule as to impeachment of its witnesses, and places it in the position of a party calling an instrumental witness. In many, if not in most jurisdictions, as the Vermont court admits, the rule is applied to the State in criminal cases, but it is upon the ground that the State stands like any other party and accredits a party by calling him, but such courts, as a rule, do not hold, as does the Vermont court, that the State is bound to call all the witnesses. "We are the more satisfied," says the Vermont court, "with the conclusion here reached because we think the State ought not to be hampered by such a rule. Prosecutions are carried on by the government, through the agency of sworn officers elected for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is to faithfully execute their trust, and do equal right and justice to the State and accused. The course of public justice, thus directed, ought not to be obstructed by a rule without a reason. The ascertainment of the truth, which is the object of the prosecution, is of more consequence than the instrumentality by which it is sought to be ascertained; and when an instrumentality becomes an obstruction to the course of justice, the State should be at liberty to remove it, and by trampling upon it if necessary."

According to the *Albany Law Journal* a Pennsylvania court has been called upon to struggle with the question as to what constitutes skim milk. The case is Commonwealth v. Hafnal, which came up on appeal from the judgment of a Philadelphia court. It appears that the defendant had been indicted under a recent statute, charged with unlawfully selling milk from which a certain valuable and necessary constituent had been wholly abstracted. It was shown that this milk which the defendant sold, instead of being skimmed in the usual way with a spoon or ladle, had been treated by the separator process, which, subjecting the fluid to a centrifugal force, operates on every particle, driving off all the lighter portion so that what remains is not worth considering. Milk so treated, the majority of the court held, is not skimmed milk, within the ordinary meaning of the term, so that it could be properly sold as such by a vendor, and the defendant was not acting honestly in selling it as such. The residuary product of this process has its distinctive name—separator skimmed milk—to indicate just what has been accomplished. The court found that by the means used in this case a fraud had been practiced on the public, in delivering to the purchaser a cheaper as well as an entirely different article, and on the honest dealer who must be driven from the market by such deceit. The court added: "Usage and custom have not only given this product a name, but qualities and attributes which are associated with the name. As such, it is purchased and used for special purposes. The demand for the different grades of milk has been met by new devices which furnish new results, and each should be given a distinctive name to truthfully represent the strength, purity and health merit of the product. The sale of these is not prohibited by the Act of 1895, if they are honestly made as articles or ingredients of articles of food, and each and every package sold or offered for sale be distinctly labelled as mixtures or compounds and are not injurious to health."

NOTES OF RECENT DECISIONS.

LIFE INSURANCE — PLACE OF CONTRACT—FORFEITURE FOR NON-PAYMENT OF PREMIUM.—The Circuit Court of Appeals for the Ninth Circuit, in the case of Equitable Life Assoc. v. Nixon, 81 Fed. Rep. 796, decide some interesting questions in the law of life insurance, the holdings of the court being that where an application for life insurance was made in the territory of Washington, and the advance premium paid there to the company's agent, to be forwarded to the company, under an agreement that the insurance should not take effect unless the premium was accepted and the risk approved by the company in New York, and, by the terms of the policy issued, all premiums and the policy itself were payable in New York, and proof of death was to be there made, the policy is a New York contract, and the rights of the parties thereunder are governed by the statutes of that State, there being no statute in the territory or State of Washington affecting the right of the parties to so contract. The statute of New York providing that no life insurance company doing business in that State shall have power to declare a policy forfeited for non-payment of premiums, anything to the contrary in the policy notwithstanding, until 30 days after it shall have mailed a notice to the assured or to his assignee, as therein prescribed, and stating that the policy will be forfeited unless payment is made within 30 days, unless a similar notice shall have been mailed not less than 30 nor more than 60 days previous to the maturity of the premium, which shall state the date of such maturity, applies to and governs a policy issued and to be performed in New York, though the assured resides in another State. It was also held that under the provision of the New York statute making the affidavit of any officer, clerk, or agent of a life insurance company, that the notice required by the statute to be given to a policy holder before a forfeiture of the policy for non-payment of premiums can be declared has been duly addressed and mailed, presumptive evidence of such fact, evidence to rebut such presumption may be given by the adverse party, and may consist in part of evidence of the non-receipt of such notice by the assured, and that the statute of New York declaring that no life insurance company shall have power to declare a policy forfeited for non-payment of premiums until 30 days after the notice therein prescribed shall have been given is mandatory, and its requirements cannot be waived by the parties.

CONTRACTS OF GUARANTY—INTERPRETATION—PARTNERSHIP.—The law applicable to contracts of guaranty is well stated by the Supreme Court of Oklahoma, in McNeal v. Gossard, 50 Pac. Rep. 159. The propositions of law there laid down are as follows: Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern; but, when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of principal and surety apply so far as is appropriate to the form of that relation recognized in the case of guarantor and guarantee, or admissible in view of the nature and terms of the particular transaction. A written guaranty given to secure the payment of a promissory note already in existence, and identified in the instrument of guaranty, is to be construed as if the promissory note were copied into the guaranty; and where the promissory note is made payable three or five years after date, and the instrument of guaranty describes it as payable five years after date, such variance between the note and the guaranty will be disregarded, as the clear intent of the parties is deducible from the transaction. A partner is a general agent, with authority to bind his firm by guaranty, where such partnership is a commercial partnership, and the giving of such guaranty is necessary in the transaction of business properly within the scope of the partnership. A partnership doing a general banking business is a commercial partnership. The discounting and rediscounting of commercial paper is within the scope of the business of a banking firm, and, when necessary to give a guaranty in order to rediscount commercial paper, a partner may bind the firm by such guaranty.

ATTORNEY AND CLIENT—EVIDENCE—VALUE OF LEGAL SERVICES — INSTRUCTIONS.—Upon the subject of proof of the value of legal services the Court of Appeals of Colorado in

the case of Millard v. Williams, 50 Pac. Rep. 207, holds that in determining the value of professional services, a jury may consider all the evidence in the case on the question, and apply their own experience and knowledge of the character of such services in determining whether they will accept the criterion of value which the expert witnesses have fixed, and that in an action for attorney's services, though it was not entirely accurate to charge that in arriving at the value the jury must consider "only the evidence of the attorneys who testified in the case, and not what they might think outside of the evidence," where no evidence as to the extent, value, and character of the services was offered except that given by two attorneys, defendant cannot complain, in the absence of a specific objection, or a request for an instruction giving the true rule.

WATER COMPANIES—CONDITION OF FURNISHING WATER—REASONABLE RULES.—The Supreme Court of Tennessee, decides in Crumley v. Watauga Water Co., 41 S. W. Rep. 1058, that a water company cannot as a condition to furnishing one water, require him to pay his outstanding duebill, which it had taken for water and piping furnished him a year or more before. In another case—Watauga Water Co. v. Wolfe, 41 S. W. Rep. 1060—the same court holds that a rule of a water company requiring an applicant for water to agree to keep his hydrant closed except when using water is reasonable. In the first mentioned case the court says:

> The trial judge was in error. There are exceptions to the general rule that a person engaged in business may, at his election, and without good reason, refuse to deal with some other person. These exceptions embrace innkeepers, common carriers, bridge companies, turnpike companies, telegraph companies, telephone companies, gas companies, electric light companies, and water companies, and are based upon the public nature of the business done by such persons. Being engaged in public business under public grants, they are charged with public duties. The defendant, Watauga Water Company, is a public corporation, as contradistinguished from a private corporation. By the law of its creation it was charged with the imperative duty of erecting waterworks and machinery of sufficient capacity to furnish Johnson City and the inhabitants thereof with a plentiful supply of water, and by its contract with that city it bound itself to furnish an ample supply of water for the use of the city and for families and domestic purposes. Thereby it assumed, first, by necessary implication of law, and, secondly, by express contract, to furnish water to all the inhabitants of the city upon reasonable terms, and without discrimination. From which it follows that the company breached its duty toward Crumley in refusing to let him have water upon its regular rates, and, as a legal consequence, became liable to him in damages for whatever injury he sustained as the proximate result of the breach. These views are not without abundant support in the authorities. Dillon, with apparent approval, refers to the case of Foster v. Fowler, 60 Pa. St. 27, as holding that a company created to supply a city with water is a public, and not a private, corporation. 1 Dill. Mun. Corp. (4th Ed.) § 52, note. Cook says: "A waterworks company is also a *quasi*-public corporation. It must supply water to all who apply therefor and offer to pay the rates." 2 Cook, Stock, Stockh. & Corp. Law, § 932. Morawetz places telegraph, water and gas companies in the same general class, treating them all as public corporations, and as charged with public duties, when organized under charters granting the right of eminent domain (as in the present charter), or other advantages not extended to private individuals engaged in private business. He says: "It may be laid down as a general rule that whenever the aid of the government is granted to a private company in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made." 2 Mor. Priv. Corp. § 1129. In the subsequent part of the same section the learned author illustrates and verifies the rule laid down by a citation and analysis of adjudicated cases. "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish." 29 Am. & Eng. Enc. Law, 19. The decision of the Supreme Court of Oregon in a late case is well expressed in the headnote, as follows: "(1) A corporation organized to supply water to a city and its inhabitants, and given the right to lay its pipes in the streets for that purpose, is engaged in a public business, and may be compelled to furnish water on reasonable terms to all inhabitants who apply for it, although there is no express provision in its grant of franchise to that effect. (2) · · · (3) *Mandamus* is an appropriate remedy to compel a water company to supply water to a person who has a right to it." Haugen v. Water Co. (Or.), 28 Pac. Rep. 244. The Supreme Court of Nebraska in a later case held that: "A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use, and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant for water furnished the same price it charges every other inhabitant for the same service, under the same or similar conditions." American Waterworks Co. v. State, 64 N. W. Rep. 711. Later still, the Supreme Court of Montana recognizing the same public character and duty of a water company, rules that the refusal of such a company "to supply water to a tenant in the possession and occupancy of a house, when he is ready to pay for it in advance, and the company is supplying the city and its inhabitants under a franchise, cannot be justified by a by-law declining to contract for water with any person except owners of property or their authorized agents." State v. Butte City

Water Co., 44 Pac. Rep. 966. These recent decisions were based largely upon the older ones to the same general effect from Indiana (Central U. Tel. Co. v. State, 118 Ind. 206, 19 N. E. Rep. 604); Massachusetts (Lumbard v. Stearns, 4 Cush. 60; Lowell v. City of Boston, 111 Mass. 464); Michigan (Williams v. Gas Co., 52 Mich. 499, 18 N. W. Rep. 236); New Jersey (Olmsted v. Proprietors, 47 N. J. Law, 333); and Wisconsin (Shephard v. Gas Light Co., 6 Wis. 539). The Supreme Court of the United States also holds that water companies and gas companies, by reason of their grants of special privileges and franchises, are charged with the obligation to render service to the public. Waterworks v. Scottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Louisiana Light & H. P. & M. Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252; Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265. A very valuable note to City of Rushville v. Rushville Natural Gas Co. (Ind. Sup.), is found on pages 321 and 322 of 15 Lawy. Rep. Ann., 28 N. E. Rep. 853. It treats boards of trade, common carriers, gas companies, innkeepers, log-drawing companies, telegraph, telephone, and gas companies, one and all, as public corporations, charged with public duties according to the purpose of incorporation; and makes citation of authorities under each designation.

The defendant in the present case cannot justify its declination to furnish water to the plaintiff by the fact of his failure to pay the whole or a part of his outstanding duebill, given for water and piping furnished a year or two before. Upon the tender of the regular rates he was entitled to the water like other persons, and without reference to his past-due obligation. The company had given him credit for the matters covered by the duebill, and could not thereafter coerce payment by denying him a present legal right. Merrimack R. Sav. Bank v. City of Lowell (Mass.), 26 N. E. Rep. 97; Wood v. City of Auburn (Me.), 32 Atl. Rep. 906; American Waterworks Co. v. State (Neb.), 64 N. W. Rep. 711.

WATERS—RIPARIAN RIGHTS — NAVIGABLE WATERS — TRESPASS.—The Supreme Court of Michigan hold in Hall v. Alford, 72 N. W. Rep. 137, that a person cannot anchor his boat in the shallow waters between an island owned by a riparian proprietor, and the channel of a navigable stream, and engage in shooting wild fowl from such boat, with the aid of decoys anchored in such waters, against the protests of such proprietor. The court said in part:

Can these waters be considered as navigable? In City of Grand Rapids v. Powers, 84 Mich. 94, it was said: "Whatever may be the power of the legislature in waters strictly navigable to fix an arbitrary line beyond which riparian owners cannot go or delegate to a municipality that power, I am satisfied no such right exists in the waters of Grand river at the rapids, or certainly in that part of the waters which are not now navigable for any purpose. The rights of the riparian owner under our laws are subject only to the public use for the purposes of navigation; and there is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce and those which are capable only of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless," citing Middleton v. Booming Co., 27 Mich. 533; Booming Co. v. Jarvis, 30 Mich. 308. See, also, Lorman v. Benson, 8 Mich. 18; East Harbor Sportsman's Club v. Kelting, 4 Detroit Leg. News, No. 18. It must be conceded that this part of the Detroit river where the defendants were is not navigable. Whatever rights they may have had to anchor their boat in the deep water of the river and there hunt wild fowl, we are of the opinion they had no right to go upon the waters which were not navigable and there anchor and hunt wild fowl. It was the property of the plaintiff, and he had the same right to control it as though it were upland. As was said in Sterling v. Jackson, 69 Mich. 488, 37 N. W. Rep. 845: "Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another's land but by consent of the owner. It will be conceded that the owner of lands in this State has the exclusive right of hunting and sporting upon his own soil." And again it was there said: "The defendant claims that he had the right to shoot the wild fowl from his boat because, as the waters were navigable where he was, he had the right to be there; that, there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position which, considered in the abstract, is quite forcible, and if applied to waters where there is no private ownership of the soil thereunder would be unanswerable. But, so far as the plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued he could navigate the waters with his vessel and do all things incident to navigation. He could seek the shelter of the bay in a storm and cast his anchor therein; but he had no right to construct a 'hide,' nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them defendant was not exercising the implied license to navigate the waters of this bay, but they were an abuse of such license." In that case, the waters were actually navigable, and yet it was held a trespass to erect a "hide" and shoot ducks, for the reason that the ownership of the soil was in the plaintiff, and the defendant by that act was not using the waters for the purpose of navigation. In the present case, the waters where the defendants were, were confessedly not navigable for any useful purpose. It is true they went there in a boat. They could have done this possibly by poling their boat up a narrow rivulet into the land to the center of the island, if such rivulet had existed, and with as much force contend that, being there in a boat, they could hunt wild fowl. Most certainly the learned circuit judge was in error, if we are to adhere to the doctrine enunciated in Sterling v. Jackson, *supra*. In that case the court compared the right of the public to navigate public waters to its right to pass over a highway on land. It was said: "It does not follow that because a person is where he has a right to be he cannot be held liable in trespass.

A person has the right to drive cattle along the public highway, but he has no right to depasture the grass with his cattle in the highway adjoining the land of another person. Also a person has the right to travel along the public highway, but this gives him no right to dig a pit or remove the soil or incumber it in front of lands belonging to others. The defendant had the right of using the waters of the bay for the purpose of a public highway in the navigation of his boat over it, but he had no right to interfere with plaintiff's use thereof for hunting, which belong to him as the owner of the soil. The public had the right to use it as a public highway, but every other beneficial use and enjoyment belonged to the owner of the soil.

MASTER AND SERVANT — FELLOW-SERVANT. —In Cunningham v. Syracuse Improvement Co., recently decided by the Supreme Court of New York, it appeared that plaintiff, while in the employ of a third party as a teamster, was temporarily hired by him to defendant, and set to hauling stone under the direction of defendant's foreman, and with the assistance of his servants, and while performing such service for defendant, was injured through the negligence of one of his assistants. It was held, that as defendant was plaintiff's master at the time of such injury, and was also the master of the person whose negligence caused the injury, such person and plaintiff were fellow-servants. The court said:

It is, of course, not to be denied that at the time of the accident the plaintiff and the person whose negligence caused his injury were engaged in a common occupation. But it is insisted, nevertheless, that they were in no legal sense coservants, for the reason that they were not in the employ of the same master. And if this contention is well founded, it is needless to say that the direction which was given to the case at the trial was unwarranted, for it must be assumed for the purpose of this review that the person in charge of the derrick was negligent, and as the relation of master and servant existed between him and the defendant, it necessarily follows that the latter was liable for the negligence of the former, unless he and the plaintiff were fellow-servants. It must be our endeavor, therefore, to determine whether the position assumed by the defendant is tenable in the face of the undisputed facts of the case, and in making this attempt it is of primary importance to find some test by which the plaintiff's relation to the defendant can be definitely ascertained. It is well settled that, in order to establish the relation of master and servant, it is necessary that the employer shall not only select the workman, but that he shall also possess the right to direct him in the performance of his work, as well as to discharge him for incompetency or misconduct. Butler v. Townsend, 126 N. Y. 105-108, 26 N. E. Rep. 1017. When the relation is thus established, the doctrine of *respondeat superior* applies as between the master and third parties. And this doctrine is founded upon the power which the master has the right and is bound to exercise over the acts of his subordinate for the prevention of accidents. Blake v. Ferris, 5 N. Y. 48, 53. We think it is quite apparent, therefore, that the real test of relationship is, first, employment, and second, power and control over the person employed. Or, as it has been tersely stated by a text writer of recognized ability: "In all such cases the test is whether, at the time of the injury, the servant was subject to the master's control." Wood, Mast. & S., sec. 424.

Subjecting, then, the facts of the case in hand to an application of this test, we find that the element of power or control is pretty conclusively established; for it is undisputed that the plaintiff, while engaged in drawing stone for the defendant, was under the absolute control of the latter; that he received directions from the defendant's foreman as to where he should station his wagon while it was being loaded, as to the manner of loading the stone, and where to unload the same, and that he obeyed these instructions. In all these respects, therefore, he occupied precisely the same relation toward the defendant as did the other workmen who were associated with him. But it is urged that there is still lacking the element of employment which is essential to the creation of the relation of master and servant, and in one sense this contention is true, for unquestionably, at the time of the accident, Cunningham was, generally speaking, in the employ of Gee, and was working only temporarily for the defendant, by permission of his general employer. But did this circumstance affect Cunningham's relation toward his fellow-laborers? That is, as to them, did it constitute him a stranger instead of coservant? In order to obtain a satisfactory solution of this question it must be borne in mind that the principle invoked by the defendant, and which has thus far been applied to this case, is one which has secured recognition in this country for more than half a century. Murray v. Railroad Co., 1 McMul. 385; Farwell v. Railroad Co., 4 Metc. (Mass.) 49. Briefly stated, this principle is that, when a person accepts employment in a business in which others are engaged with him, there is an implied agreement upon his part to assume all the ordinary risks attending such business, including accidents which result from the carelessness of his coemployees; and the foundation upon which it rests is unity of service and control. In a case therefore, where unity of several and control is found to exist, the natural deduction would appear to be that, if a person is injured by the carelessness of another, and at the time of the accident they are both subject to the orders and control of a common master, they are coservants as to the particular employment in which they are engaged, although one of them may at the same time happen to be in the general service of a third party. Or, to state the proposition more concisely, a person who is temporarily employed while in the general service of another must be treated, as to that particular employment, as the servant of the person thus employing him, and the person who has the right to direct and control his conduct in that particular business must likewise be regarded as his master, for it is quite clear that the existence of the general relation of master and servant does not exclude a like relation between the servant and a third party to the extent of the special service in which the servant may be actually engaged.

The rule as thus stated has long been recognized and adopted in Massachusetts. In the case of Kimball v. Cushman, 103 Mass. 194, it was deemed applicable as to liability to a stranger for the negligence of one employed in a special service, and in the more recent cases of Johnson v. City of Boston, 118 Mass. 114; Hasty v. Sears, 157 Mass. 123, 31 N. E. Rep. 759;

Morgan v. Smith, 159 Mass. 576, 35 N. E. Rep. 101, and Coughlan v. City of Cambridge, 166 Mass. 268, 44 N. E. Rep. 218, it was applied where, as in the present case, the general employer had temporarily loaned his servant to another for some particular purpose. In this State the decisions upon this question appear to be somewhat conflicting. In a comparatively early case it was held by the general term of the fourth department that where a servant was loaned by his general employer to a third party for some special service, and while engaged in the performance thereof carelessly drove into and injured the wagon of a stranger, the general and not the special employer was liable. Michael v. Stanton, 3 Hun, 462. And in the more recent case of Murray v. Dwight, 15 App. Div. 241, 44 N. Y. Supp. 234, the appellate division in the third department, in reviewing some of the authorities to which we have adverted, as well as several leading English cases involving the same question, lays much stress upon the fact that in the case which it was considering a horse was loaned by the general employer with his servant, and seems to regard this fact as calling for the application of a different rule from the one which would obtain if the servant only had been loaned. Why this should be so, especially in a case where the servant, and not a stranger, is the party injured, we must confess our inability to understand. But as the decision in the case last cited appears to rest mainly upon the fact that the accident to which the plaintiff attributed his injury did not occur during the course of his actual employment, what is said in the prevailing opinion as regards the question here under consideration may perhaps be treated as *obiter*. But, however, this may be, we think that the court of appeals in at least two instances has very clearly indicated the rule which should govern in cases of this character. Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. Rep. 381; McInerney v. Canal Co., 151 N. Y. 411, 45 N. E. Rep. 848. In the case first cited the defendant sold a quantity of fireworks to a committee of the citizens of the city of Auburn, and at the time fixed upon for their exhibition sent a man and a boy to Auburn to assist the committee in managing the display. The expenses of these two persons were paid by the committee, under whose directions and control they acted while in Auburn. A rocket which was discharged by the boy struck and injured one of the plaintiffs, and in an action against the general employer to recover damages for such injury it was held that:

"The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct."

When we come to apply the rule as it is thus stated to the present case, we are unable to see why it does not necessarily dispose of the question we have been considering; for, as has already been stated, the plaintiff, at the time he received his injury, was engaged in performing services for the defendant, who had the right, and did actually assume, to control his conduct. For any misconduct or inability to perform the service required of him the defendant could undoubtedly have discharged him and returned him to his general employer. The defendant was, therefore, at that time the plaintiff's master and as it was also the master of the person whose negligence caused the injury, it follows that this person and the plaintiff were coservants in the same common employment, and that no action lies against the defendant for the injury sustained by the plaintiff.

SECONDARY EVIDENCE — WHERE WRITTEN INSTRUMENT IS OUT OF THE JURISDICTION.

The question when the court will permit secondary evidence of the contents of a written instrument to be received when it is satisfactorily shown that the original instrument is at a place beyond the jurisdiction of the court, is a question which frequently arises in practice. Some courts seem to hold that, to let in such secondary evidence it is sufficient to show that the writing, the contents of which it is desired to produce in evidence, is in the hands of a stranger to the action or proceeding, and is at a place beyond the jurisdiction of the court. Other courts hold that secondary evidence of a writing is inadmissible, unless the party, who offers such secondary evidence shows, not only that the original and primary evidence, the instrument itself, is beyond the jurisdiction of the court, in the hands of a stranger to the action or proceeding, but also that such party has in good faith made reasonable efforts to procure the original instrument itself for use as evidence in the pending action or proceeding. The Court of Appeals of the State of Colorado, in Owers v. Olathe Mining Co.,[1] seems to hold with the first class of courts, saying: "It is well settled that, if books or papers, necessary as evidence in one State, be in the possession of a person living in another State, secondary evidence to show the contents of such may be given, and notice to produce them is unnecessary." The court further states, inaccurately, that: "Such has invariably been held to be the law in different States," citing a number of authorities as in support of its statement. A careful examination of these authorities will, however, we think, show that the only point decided is, that: In such cases, the writing being shown beyond question to be beyond the jurisdiction, it is unnecessary to give notice to produce it.[2] It does not appear by the report of the case in the Court of Appeals of Colorado

[1] 6 Colo. App. 13.

[2] Burton v. Driggs, 20 Wall. 125-137; Shepherd v. Giddings, 22 Conn. 282; Brown v. Wood, 19 Mo. 475.

whether the point raised was: That proof of notice to produce was not made before the secondary evidence was admitted, or whether the trial court admitted the secondary evidence of its contents, solely on a showing that the primary evidence was beyond the jurisdiction of the trial court, without it being further shown that an unavailing effort had been made in good faith by the party offering the secondary evidence to procure the primary evidence. If the ruling of the court of appeals be based on the latter point, that the mere existence of the primary evidence in the hands of a party beyond the jurisdiction, who is not a party to the action, is sufficient of itself to let in secondary evidence, the opinion of the court of appeals is in direct conflict with the weight of authority. The authorities cited by it are no longer held to be the rule by the recent decisions of the courts of last resort. One of the best considered cases, which we find, is that of Kirchener v. McLaughlin, in the Supreme Court of New Mexico.[3] In this case the question was directly raised and passed on whether: When a letter is admittedly beyond the jurisdiction of the court, secondary evidence is admissible to prove its contents, where there is no showing of any effort having been made by the party offering the secondary evidence, to produce the original letter. The trial court admitted proof of the contents of the letter in evidence, without requiring the party to show what effort he had made to procure the original, and this ruling was by the Supreme Court of New Mexico held to be error. The court say: "Defendant objected to the admissibility of such evidence on various grounds, among others, that it was incompetent. Plaintiff contended that the agency in dispute was fully authorized by a certain letter, claimed to have been written by Laughlin to Wiley. It had not been shown that the letter had been lost or destroyed; that any search had been made or any effort to produce it. It was shown, it is true, that Wiley to whom the letter had been addressed, and in whose possession it had been last seen by the witness, resided in California. Notwithstanding the fact of non-residence, we are of opinion that the objection was sufficiently specific to apprise the court, that the letter itself was the best evidence of its contents, and that secondary evidence thereof could not be received on the mere showing of Wiley's non-residence. Without the testimony of the witness, Breedon, to the contents of this letter, there was no evidence to sustain the verdict. This testimony could not be received, over the objection of the defendant, without having previously shown some effort to procure it, or to account for its non-production. No such effort was shown. The authorities cited by appellant do not sustain his position. The authorities may have fluctuated prior to the introduction of the statutory mode of taking the testimony of non-resident witnesses by deposition, but it is very clear that, since the adoption of that system, the rule has been invariable, as far as we can discover, that secondary evidence of the contents of a written instrument, constituting the foundation of a cause of action or defense, is not admissible, in the absence of statutory sanction, merely because such instrument is in the possession of a party, residing outside of the court's jurisdiction." We have examined the authorities, cited in the brief of the learned counsel for the appellee, apparently in conflict with the foregoing views (see cases below),[4] but are unable to find in any of them the approval of a different rule. The appellee relies upon a contract in writing for his right to recover in this action. The defendant denies that he ever made such a contract. Not one of these cases goes so far as to hold that, if the evidence of the execution of a contract be in a writing in the possession of a person residing beyond the jurisdiction of the court, the contents of such writing may be shown by parol, in the absence of proof that proper efforts had been made to produce it.[5] In the case of Burton v. Driggs,[6] which is frequently cited in support of the doctrine, that the mere fact of the writing being out of the jurisdiction is sufficient to warrant the admission of secondary evidence of its contents that question was not properly in issue. The object for which the books were desired was not to prove what they did show, but to prove

[3] 28 Pac. Rep. 585.

[4] Burton v. Driggs, 20 Wall. 134; Shepherd v. Giddings, 22 Conn. 282; Brown v. Wood, 19 Mo. 475; Teal v. Van Wyck, 10 Barb. 376; Boon v. Dyke, 3 B. Mon. 532; Eaton v. Campbel, 7 Pick. 10; Bailey v. Johnson, 9 Cow. 115; Mauri v. Heffernan, 13 Johns. 58.

[5] Kirchener v. McLaughlin (N. Mex.), 28 Pac. Rep. 505.

[6] *Supra.*

that they did not show certain things. The books were voluminous, were beyond the jurisdiction of the court, and the parties, who had control of them, refused to permit them to be produced. The court say: "The books being out of the State, and beyond the jurisdiction of the court, secondary evidence to prove their contents was admissible. When it is necessary to prove the result of voluminous facts, or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. Here the object was, not to prove what the books did show, but that they did not show certain things. The results sought to be established were not affirmative but negative. If such evidence be competent as to the former (affirmative results), *a multo fortiori* must it be so to prove the latter (negative results)."

An examination of the case shows that the question of the admissibility of the secondary evidence, upon the ground that the primary evidence was beyond the jurisdiction, was not necessary to the determination of the point raised, and that what was said by the court on the point was mere *dictum*. The object was to show results of an examination of voluminous books and papers. It is an established and well recognized rule of evidence, that "when the papers are voluminous, and it is only necessary to prove the general result of their examination, as that they do not contain certain specific matters, alleged to be stated therein, secondary evidence is always admissible."[7] This was the only point for decision by the court and the only point involved, on which the decision is authoritative. But, if it can be considered a decision on the question we are discussing, it is not an authority that the mere absence of the primary evidence from the jurisdiction in the possession and control of a third party justifies the admission of secondary evidence of its contents, without any showing of an effort in good faith to produce the primary evidence at the trial. The opinion of the court must be read in the light of the facts of the case, and the facts indicate that an effort had been made to procure the primary evidence, and that the parties, in whose possession it was refused to permit it to be produced. The court was certainly correct, in holding that proof of absence from the jurisdiction of the primary evidence, and the refusal of the persons having it in possession to produce it, justified the admission of secondary evidence of its contents, under the state of facts before the court. Another case frequently cited as supporting the doctrine, that the mere fact of the absence from the jurisdiction of the primary evidence, in the control of a third party, will justify the admission of secondary evidence of its contents, is the case of Binney v. Russell.[8] But this case is not in point. In that case the deposition of a witness resident in a foreign State was taken, and he was requested to attach to his deposition a certain original document, which was then in his possession, as an exhibit. This he refused to do. But he did attach to his deposition as an exhibit a copy of the same document, which he had made and had compared with the original, then in his possession, and to the correctness of which copy he made affidavit. The questions determined by the Massachusetts court were: 1st—that the original being out of the jurisdiction of the court, in the possession of a third party, who refused to part with the possession of the original, secondary evidence of the contents of the original was admissible. 2d—that a sworn copy of the original was competent secondary evidence of its contents, it being free from any suspicion, in addition to the fact that the original could not be produced by any process issued out of the court. The court nowhere intimates that it would have let in secondary evidence, had no effort been made to procure the production of the original. A ruling, similar to that of the above case, is also to be found in Illinois.[9] A careful examination of the facts in the above case of Binney v. Russell shows that the party had requested the witness to attach the original, primary evidence to his deposition, but that he refused to do so. The admitted fact that the original was beyond the jurisdiction, with proof of refusal to produce, warranted the receipt of the copy as secondary evidence of its contents. The case of Turner v. Yates,[10] is in point as to the necessity of a showing that a *bona fide* effort has been made to produce

[7] Woods' Pract. Ev., p. 15, and authorities cited.

[8] 109 Mass. 55.

[9] Fisher v. Greene, 95 Ill. 94.

[10] 16 How. U. S. 14.

the primary evidence, before the court will be warranted in admitting secondary evidence of the contents of the writing, even though it is undisputed that the primary evidence is beyond the jurisdiction. The court say: "If the paper was in the hands of the consignees in London, secondary evidence of its contents was not admissible. If it was in their possession as parties, they were entitled to notice to produce the papers. If as third persons, their deposition should have been taken, or some proper attempt made to obtain it." It will be noted that the fact, that the paper was beyond the jurisdiction of the court was admitted. This case is suggestive as to the proper procedure in case the primary evidence is beyond the jurisdiction. The first point to be determined is: In what capacity does the non-resident hold possession of the paper. If he be a party to the action, or be an agent, servant, or trustee for a party, or holding in the right of the party, so that the party is entitled to its possession, on demand the proper procedure is to serve a notice to produce such paper, though it be admitted that the paper is beyond the jurisdiction. If, upon reasonable and proper notice, properly served in time to enable the party to produce it, it is not produced when required, secondary evidence of its contents may then be given.[11] But where the primary evidence is in the absolute control of a third party, who is out of the jurisdiction, and the adverse party is not entitled to the possession of the paper on demand, no notice to produce is of any use. The party desiring to procure such primary evidence must therefore take the deposition of the third party, if he is able to learn at what place he may be found, or pursue some other proper course to endeavor to procure the primary evidence, before he has laid the foundation for the admission of secondary evidence of the contents of such document.[12] The Harvey Lumber Co. v. Herriman,[13] is like the case of Binney v. Russell, hereinbefore referred to. It shows the existence of primary evidence in the possession of a non-resident witness, his refusal to attach the original to his deposition, and his attaching a copy of the paper to it. The court say: "The absence of the original was sufficiently accounted for by showing that it was neither within the jurisdiction of the court, nor within the control of either of the parties to the suit. Under these circumstances a verified copy was the best evidence of the contents of the instrument." In this case the question of the admissibility of secondary evidence of its contents on the sole ground that the primary evidence was beyond the jurisdiction of the court was not considered by the court. The case of Brown v. Wood,[14] also supports our position. It shows an effort to produce the primary evidence through service of a notice to produce, and failure of the adverse party to produce it, as the ground for the admission of secondary evidence of its contents. The recent case of Dwyer v. Salt Lake City C. M. Co.,[15] would seem to support the view, which we oppose. But the report of the case shows that the witness produced to give secondary evidence of the contents of the instrument, testified that he had made efforts to secure the primary evidence for Hanauer's attorney, but after sending two telegrams had failed to obtain it. Under such a state of facts the Supreme Court of Utah in that case say: "Where a written instrument is traced into the hands of a party not within the State, secondary evidence is admissible to prove the contents of such instrument, and this without further showing that the instrument was lost or destroyed, because, where the party, into whose possession the instrument is traced, or in whose possession it was last seen, is beyond the jurisdiction of the court, it is neither within the power of the court to compel the attendance of such witness nor the production of the instrument. Nor in such case is notice to produce necessary."

Taking the fact as to the efforts to procure the instrument, which was in the possession of the non-resident, into consideration in reading the opinion of the court, we regard the case as supporting our views. The Zellerbach v. Allenberg Case,[16] apparently is in support of the doctrine that the instrument, being out of the jurisdiction, that fact

[11] 1 Greenl. Ev., § 560, and note; 2 Phillips Ev., § 519; 1 Taylor Ev., §§ 440, 441.

[12] Wharton Ev., § 130; Hoyt v. McNeil, 13 Minn. 394; Dickson v. Breeden, 25 Ill. 186; Gregor v. Montgomery, 4 Pa. St. 237; Booth v. Starr, 5 Day, 286; Wiseman v. R. R. Co., 20 Oreg. 425.

[13] 19 Mo. App. 214.

[14] 19 Mo. 475.

[15] 47 Pac. Rep. 512.

[16] 99 Cal. 57.

alone justifies the admission of secondary evidence of its contents. In that case it was shown that the letters to Goldstein, secondary evidence of the contents of which was offered, had been written by him and mailed, directed to Goldstein at Bremen in Germany, and that the witness had not seen them since; that in due course of the mail he had received replies thereto, and that he had no copies of the letters. The court merely decides that, under this state of facts, a letter, which is beyond the territory of the State, is "lost," within the meaning of the California statute, so as to allow secondary proof of its contents. But it nowhere in the case appears that an effort to procure the originals had not been made. On this point the report is entirely silent. It can not therefore be held to conflict with the case of Kirchener v. McLaughlin.[17] The case of Knickerbocker v. Wilcox,[18] was the case of a replevin bond, on which an action had been instituted in a State of Indiana court, and judgment recovered thereon. It was therefore presumed by the Michigan court, that the original bond remained in the Indiana court as a part of the files thereof, and the court therefore say: "Presumably therefore it was out of the jurisdiction of the courts of this State, and secondary evidence of its contents was admissible." But this ruling of the Michigan court is warranted by another well recognized rule in evidence, that certified copies of all judicial records and files are admissible in evidence on the ground of the great public inconvenience, which might arise, and their liability to be lost, if withdrawn from the proper custody. In this case the bond was properly presumed to be one of the files in the Indiana court. The remark that it was presumably out of the jurisdiction was only another way of saying that it was presumably among the files of the Indiana court, and that fact alone was sufficient to warrant secondary evidence of its contents. The opinion does not support the rule contended for, since no effort to produce the original could have been successful. In the case of Sayward v. Gardner,[19] the copy offered in evidence was a copy of a contract, written on the back of a register's receipt, which was filed in the general land office at Washington, D. C., and it was therefore beyond the jurisdiction of the court. As being a file of the general land office, a public office of the general government, it could not be withdrawn from the files of that office under the well known rule. It was duly certified to be a true copy of the writing on file, and was therefore admissible as a copy of a writing, deposited in a public office. The citation by the court of the case of Burton v. Driggs, to the effect that "secondary evidence was admissible because the original was beyond the jurisdiction, and not in the power of plaintiff to produce," was unnecessary to support the ruling, and, therefore, mere *dictum*. It is unnecessary to examine the other decisions of the courts, which, it is claimed, sustain, and are frequently cited, in support of the doctrine that: "Proof of the absence of the instrument of primary evidence is of itself alone sufficient to warrant the reception of secondary evidence of its contents." A careful examination of the leading cases usually cited in support of this doctrine will show, either that the point was not directly before the court for adjudication, and its determination necessary to the decision, and, therefore, the statement made by the court was mere *dictum;* or that the decision of the court, as to this point, was based on a state of facts, considered by the court in arriving at its decision, which is to be taken into consideration in reading its opinion; one vital fact being in every case that the party, offering the secondary evidence, had shown that a *bona fide* effort had been made to procure the primary evidence, which effort had proved fruitless, before the offer was made, and the secondary evidence of the contents admitted. Another fact shown by a careful scrutiny of the decisions is, that, in every case wherein the offer of secondary evidence of the contents of a writing admitted to be beyond the jurisdiction of the court, was made on that solitary ground, the courts of the highest standing and character in this country invariably hold that: The fact of the absence of the primary evidence from the State is not sufficient of itself alone to warrant the reception of secondary evidence of its contents.

They further hold, that: Before secondary evidence of the contents of an instrument of

[17] *Ante.*
[18] 83 Mich. 200.
[19] 5 Wash. 247.

writing, which is admittedly out of the State, can be received, the person who offers such secondary evidence must show to the court: 1st, that he has made an effort in good faith to procure the primary evidence; 2d, what those efforts were and when they were made; and 3d, that such efforts have proved fruitless. Such preliminary proof can be dispensed with only by a showing, satisfactory to the court, that the party has been unable to ascertain the locality, where the writing is, or the name and locality of the person, in whose possession it was last known to be. The principle upon which these rulings are made is: That, when it is shown that the primary evidence is probably in the possession of a certain person, from the fact that it was last seen in his possession, inquiry must be made of such person for the instrument desired, and he be requested to permit it to be used in evidence. If he then refuse such permission secondary evidence will be admissible. But where the person, in whose possession it presumably is, and his locality is ascertainable, the admission of secondary evidence of its contents, without prior proof of inquiry and request to produce, and refusal, violates that elementary principle that the party must produce the best or primary evidence, and that he will only be permitted to use evidence of an inferior degree, on proof of inability to produce the best and primary evidence. The fact that a document is out of the State is of itself no proof of inability to produce it, though it be in the possession of a third party. Such third party, his residence being known, may be willing to permit it to be produced, if requested to do so. In the absence of evidence to the contrary, the court may presume that he would be willing to produce it, if properly requested to do so. The result of such application cannot be presumed, but must be evidenced by proof of the request having been made, and the result thereof. Until refusal is shown, there is no proof of inability to produce the primary evidence. The courts uniformly hold that a party offering evidence, which is of a secondary character, must show that he has done all that he reasonably could do to procure the primary evidence, as a foundation for letting in the inferior grade of proof. After a careful and thorough examination of the numerous decision of the courts of last resort upon this question, we have been unable to find a well considered decision which fairly supports the position that: The mere absence from the jurisdiction of the original instrument will warrant the admission of secondary evidence of its contents. This point frequently arises in practice in trials in courts of record, and it is important that practicing attorneys should be familiar with the rule, which will probably guide the court in admitting or refusing to admit secondary evidence of the contents of a writing, where the original is admitted to be beyond the jurisdiction. Especially is this the case in those States in which the supreme courts have not determined this point of practice.

JOHN C. FITNAM.

Denver, Colo.

INSURANCE — VALUED POLICY LAW—TOTAL LOSS—ARBITRATION.

O'KEEFE v. LIVERPOOL & L. & G. INS. CO.

Supreme Court of Missouri, July 6, 1897.

1. Within Rev. St. 1889, § 5897 (the valued policy law), there is "a total loss" of an insured building by fire where only the foundation, and a portion of a wall which cannot be utilized at less expense than if built anew, are left unimpaired.

2. An agreement to arbitrate a total loss is void under the valued policy law.

GANTT, P. J.: This is an action upon a policy of insurance issued by the defendant to the plaintiff on the 15th day of May, 1894, insuring plaintiff for one year against loss or damage by fire, to an amount not exceeding $3,000, to his two-story and foundation brick, gravel-roof building, with its additions, porches, steam, gas, and water pipes, plumbers' work and fixtures, steam-heating apparatus and connections and piping, stone and prismatic sidewalks adjoining, plate glass, skylights, and all permanent improvements therein. The policy contained this provision: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided. It shall be optional, however, with this company * * * to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time o

giving notice * * * of its intention so to do." "If fire occurs, the insured shall furnish, if required, verified plans and specifications of any building destroyed or damaged." "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, and, failing to agree, shall submit their differences to the umpire; and the award, in writing, of any two shall determine the amount of such loss." "The loss shall not become payable until after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." "No suit or action on this policy shall be sustainable until after full compliance by the insured with all the foregoing requirements." On June 3, 1894, a fire occurred, by which plaintiff claimed the building was wholly destroyed, in contemplation of the statute of this State, and defendant claimed that there was only a partial loss, and demanded an arbitration. The great burden of the testimony was to the effect that the front, which consisted of iron pillars and brick superstructure, was rendered useless in the condition in which it was left. The pillars were warped, and the wall above them sprung out of plumb. The side walls of the lower story were so badly burned that the architects and carpenters testified that the building could not be repaired; that the old walls would have to be taken down, and the building rebuilt from the foundation up. It appeared, however, that a portion of one of the walls in the second story was not ruined by the fire, and the effort of defendant was to show that this wall could be shored up, and the burnt portion in the first story taken out and rebuilt; but the architects and builders testified that this would be much more costly than taking down the whole of the walls, and building them anew, and, even if done, would not be as good as it was before the fire. The joists were burnt, and the roof and window sills destroyed. The main contention is based upon the evidence that, so far as the witnesses could see, the foundation was not hurt much, if any. Two builders testified for defendant as to their estimates for rebuilding the house. One, Mr. Kelley, testified it could be repaired and replaced for $1,738.45; the other, Mr. Hucke, estimated it at $1,688.50; but neither testified it could be done without taking down all the old walls. Plaintiff offered testimony of builders, also, who estimated the loss, at $3,419.50 the other at $3,-752. The other defense set up in the defendant's answer—the failure of the plaintiff to furnish the defendant with plans and specifications of the building—grows out of the correspondence between the parties. The company wrote Mr. O'Keefe, under the date of June 12th, demanding an adjustment of the damages by appraisers. Mr. O'Keefe answered this under date of June 14th, informing the company that there had been a total destruction of the building, as such, and demanding the face of the policy. On July 27th, Mr. O'Keefe furnished the company with proofs of loss, which were duly received, and not objected to. On August 13th, the company wrote Mr. O'Keefe, acknowledging receipt of the proofs giving notice that they were willing to repair the building or adjust the damages by appraisers. And on August 20th the company again wrote Mr. O'Keefe, as follows: "John C. O'Keefe, Esq. —Dear Sir: We hereby give you notice that we will repair the building No. 1521 West Ninth street, Kansas City, Mo., insured under our policy 13,923, Kansas City, Mo., agency, and in this way make good the damage which occurred on the 3d day of June, 1894. You are hereby requested to furnish us with verified plans and specifications of this building for the purpose aforesaid." This letter was replied to by the counsel for Mr. O'Keefe, informing the company that, if they would rebuild from the ground up, they could do so, but that the proposition to repair was impracticable, as no part of the old walls could be used, and their use had been forbidden by the city authorities.

1. The merits of this appeal hinge upon whether this was "a total loss" by fire, within the meaning of section 5897, Rev. St. 1889, or "a partial loss" only, and therefore falling within the provisions of section 5899, Rev. St. 1889. To ascertain the fact, the court directed the jury as follows: "By a total loss is meant that the building has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing." If this is a correct instruction on the law of the case, the finding of the jury must conclude the defendant. In Havens v. Insurance Co., 123 Mo. 403, 27 S. W. Rep. 718, the court *in banc* defined "a total loss," within the meaning of a similar section, when applied to a building, to mean "totally or wholly destroyed as a building, although there is not an absolute extinction of all its parts. It matters not that some debris remains which may be useful or valuable for some purposes." Over 30 years ago, this court, in Nave v. Insurance Co., 37 Mo. 430, held that a policy of insurance upon a building was insurance upon the building as such, and not upon the material of which it was composed. In Lindner v. Insurance Co., 67 N. W. Rep. 1125, it was ruled by the Supreme Court of Wisconsin that, where the identity of a building as such has been destroyed by fire, it is a total loss, though some of its materials may not have been entirely destroyed. In that case it appeared from the evidence of the adjuster that the foundation and cellar of the house were entire, and a portion of the sills stood upon the stonework, and it was argued that, be-

cause the foundation was intact and had not been broken into a shapeless mass, it was not "a total loss." But the court said this evidence would not prevent the case from being regarded as one of total loss. "It was not expected that the foundation and cellar would be utterly destroyed." The court quoted with approval the language used in Seyk v. Insurance Co., 74 Wis. 72, 41 N. W. Rep. 445, that "it cannot be doubted that the identity and specific character of the insured buildings were destroyed by fire, although there was not an absolute extinction of all the parts thereof." "This was entire destruction of the buildings, within the meaning of the statute." So clear, indeed, did it seem to the court, that it held that the circuit court might have properly given a peremptory instruction that it was a total loss. To the same effect are the following decisions: Oshkosh Packing & Provision Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200; Insurance Co. v. Eddy, 36 Neb. 461, 54 N. W. Rep. 856; Insurance Co. v. Bachler, 44 Neb. 549, 62 N. W. Rep. 911; Insurance Co. v. Garlington, 66 Tex. 103, 18 S. W. Rep. 337; Huck v. Insurance Co., 127 Mass. 306; Williams v. Insurance Co., 54 Cal. 450. In Corbett v. Insurance Co., 85 Hun, 250, 32 N. Y. Supp. 1059, the court said: "There was sufficient to go to the jury upon the question whether the building had 'lost its identity and specific character as a building.' If it had, then there was a total destruction, within the meaning and intent of the parties and the policy." See, also, Insurance Co. v. McIntyre (Tex. Civ. App.), 34 S. W. Rep. 669. We hold the instruction was proper, and that the court committed no error in refusing to instruct for defendant that if the cellar walls remained, and the lower floors were in such condition that they could be safely used in rebuilding, the building was not wholly destroyed. The escape of the stones in the foundation walls from complete extinction, if such a thing be possible, did not prevent the destruction of the building, as such, being total.

2. It follows as a necessary corollary that as the jury found there was a total loss, and the right to an arbitration was only stipulated for in case of a partial loss, there was nothing to arbitrate. An agreement to arbitrate in case of a total loss is repugnant to our statute and void. Daggs v. Insurance Co. (Mo. Sup.), 38 S. W. Rep. 85; Havens v. Insurance Co., 123 Mo. 403, 27 S. W. Rep. 718. Clearly, an appraisement of property wholly destroyed would be an anomaly.

As to the remaining points, they seem to be without merit. The proofs were duly made out, and no objections were made to their sufficiency. The whole case depended upon the claim of plaintiff that the loss was total. If he was right, there was nothing to appraise, nothing to arbitrate. Under proper instructions, the jury sustained his claim, and their verdict concludes the fact. The judgment is affirmed.

NOTE.—*What Amounts to a Total Loss.*—In many of the States statutes have, of comparatively late years, been enacted fixing the amount of a policy of insurance as the measure of damages or recovery in the event of a loss. Such laws usually have reference to real property, only, and, therefore, the question what is and what is not a total loss becomes one of much importance in litigation arising under these late laws. Usually, where the facts are such as to leave it a question from which different intelligent minds might well draw different conclusions, the issue touching a total loss will be one of fact for a jury to determine. German Ins. Co. v. Eddy, 36 Neb. 461; Corbett v. Ins. Co., 85 Hun, 250; Insurance Co. of North America v. Bacheler, 44 Neb. 549; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7. And where it is shown by uncontradicted evidence, or admitted that the building is so far destroyed as to lose its identity and character as such, it is proper for the court to direct a verdict in favor of the assured for the full amount of the policy. And this is true, though there may be some small part of the materials which are not entirely destroyed. Linder v. St. Paul Fire & Marine Ins. Co., 93 Wis. 526. Where the fire destroyed all the combustible material of a building, leaving only a portion of the brick walls, the brick in the remaining walls being rendered practically useless by the fire, it was held that there was a total loss on the building. Seyk v. Millers' National Ins. Co., 74 Wis. 72. A building which is rendered insecure to life by a fire, and which has been condemned by the municipal authorities, and its repair cannot be had with safety and, further, is forbidden by law, there is a total loss within the meaning of the statute, and the face of the policy can be claimed accordingly. Montelone v. Royal Ins. Co., 47 La. Ann. 1563; Hamberg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103; Brady v. Insurance Co., 11 Mich. 426. If the building insured be of brick or other material not easily injured by fire, and some of such material is not destroyed, though by the fire the building has lost its specific character as a building, while this will be a total loss, and subject the company to liability for the full face of the policy, yet, upon the payment of such loss, the company will be the owner of any of the material which may not be actually destroyed. And if the assured appropriate the same to his use he will be liable to the company therefor, and the same may be set off by the company against a demand on the policy if the appropriation is made before suit or, if afterwards, is the company will have a right of action against the assured, as for conversion, to recover the value of the parts of the building not destroyed. German Insurance Co. v. Eddy, 36 Neb. 461; Royal Insurance Co. v. McIntyre (Tex. Civ. App.), 34 S. W. Rep. 669. In all these cases the theory of the law is that the insurance is on the building, as such, and not upon the materials of which it is composed; and when the building is so far destroyed as to be no longer appropriate for its uses and purposes without rebuilding, then a total loss has occurred. German Insurance Co. v. Eddy, 36 Neb. 461; Insurance Co. of North America v. Bacheler, 44 Neb. 549. In Havens v. German Fire Insurance Co., 123 Mo. 403, mentioned in the principal case, the insurance was on a building and machinery, all of which the court thought was real property under the facts and circumstances, and, when the fire occurred, part of this machinery had been removed for repairs. The part of the property covered by the policy, and which had been removed, and which was not destroyed, however, amounted to about one-twentieth of the value of the building. The learned court thought, nevertheless, that there had been a total loss, notwithstanding this material part

of the building had not been injured by the fire, and held that the assured was entitled to recover the full face of the policy, less the value of the property removed. The decision, though, was by a divided court, and the learned judge who dissented was obviously fortified in his conclusions by principle and good common sense. It is difficult to see how it can be held a total loss when a material part and parcel of the property insured has been taken away and has, thereby, escaped the ravages of the fire. Again, if the loss is total, it is a liquidated demand for the full face of the policy, not for such amount less the value of that material part not injured either in market value or usefulness. It is true that where a company writes a policy of insurance on a building which has previously been destroyed in part by fire, it will be liable for the face of the policy if it is afterwards consumed by fire during the life of the policy. For, in such a case, the company, with knowledge of all the facts, has written a policy on a house which has been partly destroyed, and there can, in no event, be a loss on that part of the building which has been damaged previously. The insurer, however, is liable for the full amount of the policy upon the destruction of such a building, for this is all that was insured, and it has all been destroyed. There is none left for the assured—no remnants or uninjured parts which may be used. All that was insured, no more and no less, has been destroyed, and, consequently, the liability of the company is complete. Hamberg-Bremen Fire Insurance Co. v. Garlington, 66 Tex. 103. Where no portion of the walls of a brick building remain after the fire which could be used to advantage in rebuilding the structure, and the foundations are so injured as not to be strong enough to support a building of like demensions and material as the one burned, and where it would cost more to remove the debris from the burned building than the same is worth, there is a total loss within the meaning of the law. Harriman v. Queen Insurance Co., 49 Wis. 71. But it is not the policy of the law to inflict upon the companies the liability for the full amount named in the policy unless there is necessarily such a total destruction of the building that it cannot, with profit, or to advantage be rebuilt, or the part that is not destroyed cannot be well utilized in effectually restoring the building to its former condition by repairs. Where a building is damaged by fire but some of the walls remain intact and comparatively uninjured, and can well be used for rebuilding the structure, being sufficient to support that part of a building of the same weight, dimensions, value and construction as the one damaged or destroyed in part, and by using the remaining walls thus left practically uninjured the building could be rebuilt for a sum materially less than it would require to build a new structure entirely, the loss will not be total. Ampleman v. North British & Mercantile Ins. Co., 35 Mo. App. 308. The case of Royal Insurance Co. v. McIntyre (Tex. Civ. App.), 34 S. W. Rep. 669, reversed by the Supreme Court of Texas, 37 S. W. Rep. 1068, is an important one on the subject of a total loss. In this case, the roof of the building was burned off and the east wall, where the fire caught from an adjoining building, was practically destroyed, and the rooms in the attic, as well as the attic floor, were ruined. But the second and lower stories (the building having been a frame structure two and a half stories high) together with the partitions, doors, windows, blinds, the south, west, and north walls, were still standing in position and not injured to any great extent. The plastering, papering and floors and the finish of the woodwork inside was very much damaged by water. The debris of the roof was all piled on the attic floor, but the fire did not burn through the floor. Part of the stairway had been burned. The cornice inside the building was so injured as to necessitate replacing. The laths and most of the ceiling over the second floor remained. The building was not burned on the inside anywhere below the attic floor except a portion in the east of the kitchen and the room over it. The damage did not extend below the third or attic floor. A large part of the weather-boarding of one wall only required a coat of paint to make it practically as good as before the fire. About two-thirds of the weather-boarding of one wall was burned off. Part of the blinds and sash of the burned walls were uninjured. The studding was not entirely burned away at the place of the fire. The walls of the building remained in plumb and were in no danger of falling. The insurance company offered to prove in this case that the building as it stood after the fire was worth about $2,500, and that it could be restored to its original usefulness and value at a cost from $1,200 to $1,800. The trial court refused to permit this evidence and rendered judgment for the full face of the policy as a liquidated demand for a total loss of the building. On appeal to one of the numerous courts of civil appeals in Texas, that tribunal, strange to say, affirmed this ruling, but upon error to the Supreme Court of Texas that learned court held this error and, after a very learned review of the authorities and proceeding upon logical and forcible reasoning, declared the law of the case to be in favor of the company and that there was no such total loss as contemplated by the Texas statute making the amount written in the policy a liquidated demand in case of a total loss. These cases but really reflect what seems to be the consensus of all the few authorities on this comparatively new question of law. This, is, when, as announced in the principal case, the structure is so far destroyed as to lose its entity and character of a building; when the damage to it is such that it cannot with advantage or convenience be replaced without practically building anew; and especially when the building is so far consumed that the remaining part is not worth as much as it would cost to reclaim it; and, when reclaimed, can serve little or no material advantage in the repair or rebuilding of the structure, the loss will be considered and held to be total and entitle the assured to a standing in court accordingly. Linder v. St. Paul Fire & Marine Insurance Co., 93 Wis. 526; Seyk v Millers' National Ins. Co., 74 Wis. 72; 1 Wood, Ins., § 107; German Insurance Co. v. Eddy, 36 Neb. 461; Great Western Ins. Co. v. Fogarty, 86 U. S. 640; Oshkosh Packing & Provision Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200; Havens v. Germania Fire Insurance Co., 123 Mo. 403; Royal Ins. Co. v. McIntyre (Tex. Civ. App.), 34 S. W. Rep. 660.

W. C. RODGERS.

JETSAM AND FLOTSAM.

TESTIMONY OF PRISONERS IN THEIR BEHALF.

Should a prisoner ever take the stand and testify in his own behalf? Speaking from the standpoint of the accused, the answer would certainly be "no." The cases in which the chances of acquittal have by such means been improved are very rare, while in most instances the effect is to forge still tighter the links of the chain which the prosecution seeks to bind about

the prisoner. Attorneys of very large experience at the criminal bar aver that they never saw a prisoner who did not, when examined, play havoc with his own case. On the other hand, the opinion will be usually expressed that it would be exceedingly unjust that a prisoner should not have the opportunity, if he saw fit, or his advisers thought fit, to speak in his own behalf; that it is an anomaly in the law that he should not be at liberty to do so. In cases where it is possible to examine a prisoner in his own behalf, if he does not take advantage of the privilege it is always commented on that he could have done so, and has not done so, and that therefore it must be taken as an indication that he could not make a case in his own defense. It is pointed out that an innocent man might become so excited and nervous in the hands of a shrewd and clever cross-examiner that he would make it appear that he was guilty when he really was innocent. Looked at from the point of view of the public, there can be no doubt that the privilege accorded persons accused of crime, in this country, of testifying in their own behalf, if they see fit, tends materially to compass the ends of justice. The discussion of the subject is made timely by the pending proposition, on the other side of the water, to extend the operation of the Evidence in Criminal Cases Bill to Ireland. There ought to be no doubt about the passage of an amendatory statute for that purpose.—*Albany Law Journal.*

COMMERCIAL PAPER BASED ON PRE-EXISTING DEBTS.

The New York "Negotiable Instruments Law," adopted upon the recommendation of the Uniformity Commission has absolished a rule, which over fifty years has existed in the jurispudence of New York. It will be remembered that in Swift v. Tyson, which was an action upon a bill of exchange accepted in New York, the defense rested on an allegation, that the bill had been received in payment of a pre-existing debt. Although the bill had been received *bona fide*, and before maturity, it was held by the New York Court of Appeals, that the receipt of a note in payment of a pre-existing debt was not such a receipt in the usual course of trade as to give an indorsee any rights on the paper beyond those against the indorser. It will also be remembered that when in 1842 this cause came before the Supreme Court of the United States (16 Peters, 1), it was reversed by the application of the rule, which has since expanded into a system of general commercial jurisprudence, viz.: that notwithstanding the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States, this law would only apply to the positive statutes of a State and would not extend to commercial contracts.

This holding has become the foundation for the doctrine that the national courts will decide such point of law according to their own view of general jurisprudence, although it would lead to a non-recognition of precedents in the State courts, in which the controversy arises. This rule has always provoked considerable hostile discussion, and Mr. Justice Mitchell of the Pennsylvania Supreme Court, 128 Pa. St. 228, (1889) spoke of it is that "unfortunate misstep that was made in the opinion in Swift v. Tyson, wherein the courts of the United States have persisted in the recognition of a mythical commercial law and have professed to decide so-called commercial questions by it in disregard of the law of the State, where the question arose."

But notwithstanding, the pre-existing debt rule has been abolished, regarding commercial paper, it still exists as a binding rule in the State of New York in regard to other contracts. The Illinois rule has always been a contrary one. — *National Corporation Reporter.*

FRAUDULENT MISREPRESENTATION AS A GROUND FOR ANNULLING A MARRIAGE.

The decision of Sir Francis Jeune in the nullity suit of Moss v. Moss has not come as a surprise to lawyers. It was generally admitted that there was no English authority for the proposition on which the petitioner's case was founded—that the concealed pregnancy of the wife at the date of marriage is a sufficient ground for declaring the marriage null and void. Absence of authority is not necessarily fatal even at the present day; in the earlier days of English jurisprudence its absence was the opportunity of those great judges who laid down the principles upon which many of the now recognized doctrines of our law are founded. But in recent times the bench is less bold, and judgments, except where they turn upon the construction of statutes or documents, for the most part consist of an examination of decided cases, and new departures are few and far between. The president of the division before which Moss v. Moss came for decision did not rise superior to the rule which guides the modern court of law. Alluding to the proposition of the petitioner, he said: "It would perhaps be sufficient for me to say that for this proposition no authority in English law can be found, and it would be impossible for this court at the present day to give assent to a principle of such importance and so far-reaching without the sanction, of precedent." "Impossible" was a rare word in the vocabulary of the bench in the earlier days to which we have referred.

But fortunately Sir Francis Jeune's judgment does not end here, and few will be disposed to question the correctness of his decision. The argument on behalf of the husband was that the concealed pregnancy of the wife constituted a fraudulent misrepresentation as to one of the essentials of the marriage contract, and was therefore sufficient to avoid it *in toto*. But it is one of the many distinctions between the contract of marriage and ordinary contracts that such misrepresentation as would avoid a mercantile bargain is not necessarily sufficient to nullify a marriage. The essentials which go to make a marriage valid are clearly defined by the learned president; there must be the voluntary consent of both parties, compliance with the requirements of the law as to publication and solemnization, and no capacity, either physical, or of age, or relationship. If these requirements have been fulfilled, the marriage is not void or voidable. Marriages have often been set aside on the ground of fraud or duress, but this has only been where the fraud or duress was such as to negative the first essential of a valid marriage—the voluntary consent of the parties. Under this head fall cases of personation, and cases in which a weak-minded person has been induced by deception or threats to go through the marriage ceremony without understanding it and without giving any real consent. The comparatively recent case of Scott v. Sebright, 12 P. D. 21, will occur to most readers as an instance of this kind. The mere presence of fraud is not the *ratio decidendi* in such cases, but the absence of consent; as Lord Stowell puts it in Sulivan v. Sulivan, 2 Consist, 248, "if the person is capable of consent and has consented, the law does not ask how the consent has been induced." It is true that in Scott v. Sebright, the late president expressed himself somewhat differently when he said

that "the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." But this is a *dictum* merely, and it is out of harmony with several weighty decisions. The facts in Scott v. Sebright completely justified the decree in that case on the ground of absence of consent.

Although there is no decided English case in which the question raised by Moss v. Moss came up for decision, the precise point is dealt with in the canon law and is there decided in favor of the validity of the marriage. So far, therefore, as concerns the English marriage law and the ecclesiastical law on which it is mainly founded, there was no precedent for the contention of the petitioner in Moss v. Moss. In foreign courts there is considerable authority in his favor, and this is so even in America. Sir Francis Jeune discussed some of these foreign cases at length, and pointed out what seems to be a fatal defect in the logic of the learned judges who decided them—that while they treat actually concealed pregnancy at the date of the marriage as a ground for a decree of nullity, previous unchastity, whether coupled or not with previous pregnancy, and whether or not concealed from the husband, is not so treated. Surely the unchastity, and not its complement, the pregnancy, is the more serious matter.

At the close of his judgment the president gives some weighty reasons which we venture to think would have justified his decision quite apart from authority or the absence of authority. He points out the very grave consequences which would result from a contrary decision. Suppose the case of a man who, owing to absence from home soon after his marriage or for some other reason, only discovered years after his marriage that his wife had been pregnant by another man when he went through the ceremony of marriage with her. Is he then to be permitted to set aside the marriage and to bastardize the children born of it? Or is there to be a statute of limitations running from the date of the marriage and not from the date of the discovery? Is the illogical distinction of the American courts to be adhered to? Or if prior unchastity on the part of the woman is to be a ground for a decree of nullity, is the same to hold good in the case of the man? A thousand difficulties suggest themselves as likely to arise if the law were shaped to meet the hard case of the petitioner in Moss v. Moss. Such cases are, we hope, rare, and the effect of the recent decision ought to be to keep out of the courts any such that may arise.—*The Solicitor's Journal.*

BOOK REVIEWS.

BALLARD'S ANNUAL, VOL. 4.

This is volume four of a series of annual reports now well know to the profession containing a complete compendium of real estate law, embracing all current case law, carefully selected, thoroughly annotated, and accurately eptomized. It is in effect a digest of all real estate cases for the period of time it covers. But it is much more satisfactory than most digests, inasmuch as the statement of the cases is much larger and the cases cited by the court are also stated. To those interested especially in real estate law the series is of good value. Published by the Ballard Publishing Co., Crawfordsville, Ind.

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The author of this condensed work of nearly three hundred pages is Dwight Professor of Law in Columbia University Law School, and the book is designed especially for law students. As an elementary work it is admirable in arrangement, clear and logical in treatment. It is bound in cloth and published by Little, Brown & Co., Boston.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMINISTRATION—Depreciation of Property—Sale of Land.—Where the personal assets of an estate consisted principally of bank stock which was yielding an income, the sale of which was postponed by the administrator, acting in good faith, and on the advice of counsel and of the residuary legatee, pending the litigation of disputed claims, and in consequence of such delay, and by reason of an unforseen change in financial conditions, it was ultimately sold at a loss, the administrator will not be held liable for such loss.—PEARSON V. GILLENWATERS, Tenn., 42 S. W. Rep. 9.

2. APPEAL—Exceptions—Record.—Under Rev. Stat. 1894, § 638 (Rev. Stat. 1881, § 626), providing that a party objecting to a decision must except at the time it is made, a corporation that has allowed an order placing it in the hands of a receiver to be made, without excepting, cannot object to such appointment on appeal.—CHICAGO & S. E. RY. CO. V. MCBETH, Ind., 47 N. E. Rep. 678.

3. ASSUMPSIT.—Assumpsit is the proper remedy for recovery of money paid under an agreement for a consideration which has wholly failed.—NEWBERRY LAND CO. V. NEWBERRY, Va., 27 S. E. Rep. 897.

4. ATTACHMENT—Fraud of One Partner.—The act of the sole managing partner in withdrawing partnership funds, and applying them to his own use, knowing that the firm is insolvent, is ground for attachment against the firm.—WINNER V. KUEHN, Wis., 72 N. W. Rep. 227.

5. ATTORNEYS—Authority—Ratification.—Where it is sought to hold liable a party for attorney's fees earned in the foreclosure of a mortgage held by such party, and the employment of the attorney is dependent on whether or not one who had authorized the commencement of such foreclosure proceedings did so with authority from the mortgagee, the burden of proof is on the attorney to establish such authority, and evidence which tends to negative the existence of such authority in the alleged agent is admissible under

proper pleadings.—SAXTON v. HARRINGTON, Neb., 72 N W. Rep. 272.

6. BANKS — Insolvent Bank — Deposit of Check.—A customer who deposits a check to his credit in a bank, known by its officers to be hopelessly insolvent, may reclaim the proceeds thereof, if they can be identified and separated. — WILLIAMS v. COX, Tenn., 42 S. W. Rep. 3.

7. BANKS—Money Paid on Forged Indorsements on Checks.—In an action against a bank to recover money paid by it on three checks drawn by complainant, payable to T's order, and delivered to W, who forged indorsements thereof by T, it appeared that his transactions with W covered a period of 18 months, during which he turned over to W 35 checks, all payable to T's order, 32 of which were paid on indorsements like those on the three checks in question, and all of which complainant claimed were forgeries; that during such period his account was balanced three times, and he never examined it until after "this litigation" arose; and that he knew T's signature, and the signatures on all the checks were forgeries except possibly two: Held, that recovery was not prevented by complainant's negligence, it appearing that there had been no loss to complainant or the bank on account of the 32 checks, and hence no cause to challenge an inspection of the indorsements thereon.—POLLARD v. WELLFORD, Tenn., 42 S. W. Rep. 23.

8. BENEFICIAL ASSOCIATIONS—Subordinate Lodges—Ownership of Funds.—Moneys received by the subordinate lodge of a beneficial order were held in trust, to be used for lodge expenses and dues, for sick benefits and for burial expenses of members. A majority of the members of a subordinate lodge disbanded and surrendered their lodge charter; first, however, making a present of the funds in the treasury to a sick-benefit society, which they had formed independently of the order: Held, that such a disposition constituted a wrongful diversion of the funds.—SCHUBERT LODGE, No. 118, K. OF P. OF NEW JERSEY, v. SCHUBERT KRANKEN UNTERSTUETZUNGS-VEREIN, N. J., 38 Atl. Rep. 347.

9. BENEVOLENT SOCIETY — Insurance — Payment of Dues.—In an action on a mutual benefit certificate, the burden of proving a defense of non-payment of dues is on defendant.—PETHERICK v. ORDER OF THE AMARANTH, Mich., 72 N. W. Rep. 262.

10. BILLS AND NOTES—Joint and Several Liability.—The makers of a joint note are liable individually for the full amount as the obligation is, by law, joint and several.—SULLY v. CAMPBELL, Tenn., 42 S. W. Rep. 15.

11. CHATTEL MORTGAGES—After-acquired Property.—To secure the payment of a debt, and also money and supplies to be advanced, a farmer executed a trust deed of crops to be raised, and "also all tools, gearing, and implements of whatever kind, used and to be used in making and gathering said crops, including wagons of whatever kind." Subsequently the creditor purchased a wagon and harness for the grantor, at his request, to be used in gathering the crops, and charged the price on the indebtedness secured by the deed: Held, that the deed covered such property.—JUDGE v. JONES, Tenn., 42 S. W. Rep. 4.

12. CONTRACTS—Compensation—Claims Against Decedent's Estates.—The claim of an illegitimate child against her father's estate for services rendered, he having failed to will her his property in consideration thereof, as he had agreed, is not satisfied by certain of the heirs conveying to her their share of the estate for an expressed, nominal consideration, and a consideration of love and affection.—WADDELL v. WADDELL, Tenn., 42 S. W. Rep. 46.

13. CONTRACT — Subscription — Delivery.—An agreement to pay sums set opposite subscribers' names, on erection of certain works in a certain portion of the city, is without effect unless delivered to a person to perform or secure the performance of the conditions therein imposed. — HELLER v. ELWOOD BOARD OF TRADE, Ind., 47 N. E. Rep. 649.

14. CORPORATIONS — Insolvency — Trust Funds.—On October 18th a certain corporation was hopelessly insolvent, and had no reasonable expectation of redeeming its fortunes, and it therefore suspended business, and refused to accept orders, or otherwise exercise its functions. On the morning of October 21st, its directors, by resolution, declared its insolvency and inability to further carry on its business, and instructed its president to cause to be filed in the chancery court a general creditors' bill for the administration of its affairs and distribution of its assets: Held, that from the time such resolution was passed, the company's assets were a trust fund for the benefit of all its creditors, and one creditor could not afterwards obtain priority of satisfaction of his claim by levy of an execution on personal property before such creditors' bill was filed.—MEMPHIS BARREL & HEADING CO. v. WARD, Tenn., 42 S. W. Rep. 13.

15. CORPORATIONS—Officers—Assignments for Benefit of Creditors.—An insolvent corporation has the right to make a general assignment of its property for the benefit of its creditors, unless prohibited by its charter or some statute. The directors of an insolvent corporation may make an assignment for the benefit of creditors, without the assent of the stockholders.—BOYNTON v. ROE, Mich., 72 N. W. Rep. 257.

16. CRIMINAL LAW—Elections—Bribery.—Under Rev. Stat. 1894, § 2329, providing that "any person who shall give or offer to give any money, property, or other thing of value, to any elector to influence his vote, at any regular election," shall be guilty, etc., it is not necessary that the object for which the corrupting gift is given shall be attained before liability arises.—STATE v. DOWNS, Ind., 47 N. E. Rep. 670.

17. CRIMINAL LAW—Forgery—Indictment.—An instrument signed by S, and reciting "S hereby agrees to pay, on publication, $65 for the insertion of 1 page and 1 display heading," is not a promissory note or order for money, declared by How. Ann. St. § 9218, the subject of forgery.—PEOPLE v. PARKER, Mich., 72 N. W. Rep. 250.

18. CRIMINAL LAW—Homicide— Instructions. — It is not error to add to a definition of manslaughter as the killing of a human being, without malice, in sudden heat and passion, and on sufficient legal provocation, that the heat and passion should amount to "an uncontrollable impulse," and that passion should so inflame that "he hardly knew what he was doing."—STATE v. DAVIS, S. Car., 27 S. E. Rep. 905.

19. CRIMINAL PRACTICE — Fornication—Indictment.—An indictment charged that on September 10th, and at other times, Pinzen Smith, an unmarried man, and Rachel Branstetter, at the time being unmarried, did live and cohabit together as man and wife, contrary, etc.: Held, that the indictment sufficiently charged the offense of cohabiting in a state of fornication, although there was no direct allegation that Rachel Branstetter was a woman.—STATE v. SMITH, Ind., 47 N. E. Rep. 685.

20. CRIMINAL PRACTICE — Indictment—Duplicity.—A count in an indictment alleged that an assault and battery was made upon a female under 10 years of age, with intent to have carnal knowledge of her, and with intent to commit rape, and that forcibly, feloniously and violently the defendant did ravish and criminally know her: Held, that the count was not duplicitous, repugnant or ambiguous, as charging both assault and battery and rape.—DEBERRY v. STATE, Tenn., 42 S. W. Rep. 81.

21. DEED—Covenant—Action for Breach.—Even if a deed *inter partes*, as well as a deed poll, can be sued on by a person not a party to it, under Code 1887, § 2415 (providing, if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, he may maintain any action thereon which he might maintain if it had been made with him only, and the consideration had moved from him to the party making such

covenant or promise), still one not a party thereto cannot sue thereon unless he is plainly designated by the instrument as the beneficiary, and the covenant or promise is made for his sole benefit.—NEWBERRY LAND CO. v. NEWBERRY, Va., 27 S. E. Rep. 899.

22. DEEDS — Defective Authentication — Re-registration.—Where the registration of a deed is ineffectual, because the judge of the court before whose clerk the acknowledgment was made did not certify to the official character of that clerk, as required by Mill. & V. Code, § 2859, a re registration, with the omitted certificate, takes effect, as to the grantor's creditors, from the date the amended deed is noted for registration, and does not relate back to the noting and registration of the defective deed.—CITIZENS' BANK OF JELLICO v. MCCARTY, Tenn., 42 S. W. Rep. 4.

23. DEEDS—Registration.—The notation of a deed for registration, as required by Code, §§ 2072, 2073 (Mill. & V. Code, §§ 2887, 2888; Shannon's Code, §§ 3749, 3750), in order to give such deed effect as against the creditors of the vendor from the date of such noting, was sufficient, where the date of the receipt thereof was indicated in the register's note book, by "ditto marks" referring to words and figures in the preceding line.—HUGHES v. POWERS, Tenn., 42 S. W. Rep. 1.

24. EASEMENT —Implied Grant.—Where one who is the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another as a means of egress and ingress to the latter from his home, and also to the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and also adds materially to its value, conveys by deeds of the same date the part with the way to it to one of his children, and the part with the way over it to another one of them, each takes his part to be enjoyed with reference to the way as the same existed at the time of the division—the one with an implied grant of the way to it, and the other subject to such way as an easement therein.—BAKER v. RICE, Ohio, 47 N. E. Rep. 653.

25. ESTOPPEL—Discharge of Notes.—Where one, after mortgaging property, sold it, the purchaser agreeing to pay the mortgage notes, the mortgagee who takes the notes of the purchaser in place of those of the mortgagor, and surrenders the mortgagor's notes to him, and by his conduct and actions with respect to the property leads the mortgagor to believe that his notes are discharged so far as he is concerned, whereby the mortgagor is induced to act on this theory in his relations and dealings with the property, is estopped to assert the notes and the lien of the mortgage therefor against the mortgagor.—HALE v. DYKES, Tenn., 42 S. W. Rep. 64.

26. FEDERAL COURTS—Enjoining Suit in State Court—Concurrent Jurisdiction.—A circuit court of the United States will not, at the instance of a receiver appointed by a State court in another State, enjoin creditors who have attached property in a State court in this State from prosecuting their suit in the State court; nor will it make any order requiring the sheriff to deliver property in his custody under attachment proceedings to the receiver of the circuit court. The general rule is that, where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first seized, and the court which first obtains possession of the *res* must be allowed to dispose of it without interference or interruption from a coordinate court. Under the state of facts above set out, a circuit court of the United States will not look into the pleadings in the State court to see whetner any cause of action is stated, for the reason that the pleadings, if defective, may be amended; and, if the facts are such as not to admit of an amendment, the State court is the proper tribunal to determine that question.—HALE v. BUGG, U. S. C. C., W. D. (Ark.), 82 Fed. Rep. 33.

27. FRAUDULENT CONVEYANCES—Existing and Subsequent Creditors.—Where a judgment was entered against a debtor after he had made a voluntary conveyance to his wife, on several items of indebtedness, some of which accrued after the conveyance was made and recorded, such conveyance is void as to that part of the debt incurred before the conveyance, and valid as to the part incurred subsequently thereto.—COLE v. BROWN, Mich., 72 N. W. Rep. 247.

28. FRAUDULENT CONVEYANCES — Rights of Subsequent Creditors.—At the time of a voluntary conveyance, the grantor owed complainant. The debt was afterwards paid, but at the time of payment a new indebtedness had arisen between the parties: Held, on a bill by complainant to set aside the conveyance as fraudulent, that he was a subsequent creditor, in whose favor no presumption of fraud arose.—NELSON v. VANDEN, Tenn., 42 S. W. Rep. 5.

29. HIGHWAYS—Abutting Owners—Obstructions.—The abutting owners on a street, called for in the respective deeds under which they claim, though not accepted or worked on behalf of the public, have each a property interest therein and the right to invoke the interference of equity to prevent its obstruction.—PERKINS v. ROSS, Tenn., 42 S. W. Rep. 58.

30. HIGHWAYS — Drains.—The legislature may lawfully authorize the laying of drains in highways, and the alteration thereof, by other officers than those having the highways in charge.—KILEY v. BOSD, Mich., 72 N. W. Rep. 253.

31. HIGHWAYS — Increasing Width.—3 How. Ann. St. §§ 1365, 1366, providing that when any public highway "which passes along the bank" of any lake, river, or other water course, and which is not included in the limits of a city or village, shall, by the washing away of the banks, or from any other cause, become reduced to a width of less than 50 feet, the highway commissioners shall lay out such highway upon adjacent land to that width, does not refer to highways in which a ditch or other artificial water course may be laid, and which may be so reduced in width.—DE LAPP v. BECKWITH, Mich., 72 N. W. Rep. 237.

32. HUSBAND AND WIFE — Implied Trust.—The mere fact that one-half the price of land conveyed to a married man is paid by his wife's father, as an advancement to her, creates no implied trust in her favor, where the father knows the land is to be conveyed to the husband alone, and the latter is guilty of no breach of trust in taking title in his own name.—LEWIS v. STANLEY, Ind., 47 N. E. Rep. 677.

33. INJUNCTION — Interlocutory Injunction—Dissolution.—A bill alleged that defendants had conspired to injure plaintiff's business as dealer in gas burners, mantels, etc., by stating that one of defendants owned a valuable patent in gas burners, which plaintiff was infringing, and that those who purchased were liable to suit for infringement, and that it was not true that such defendants had such patent, but that it had expired: Held, that it was not error to dissolve an interlocutory injunction on defendant's affidavits denying all the material averments in plaintiff's affidavits, and alleging in positive terms the ownership by such defendants of the alleged patent, and that the goods sold by plaintiff were an infringement.—WALKER v. BACKUS HEATING CO., Wis., 72 N. W. Rep. 280.

34. INJUNCTION — Liability on Bond — Damages.—Where a bill for an injunction against the construction of a building alleged that the construction was actually taking place, and that complainant would suffer irreparable damage thereby, complainant would not afterwards be heard to say, in mitigation of damages caused by the temporary injunction, that the erection of the building was a matter of uncertainty.—SPEARS v. ARMSTRONG, Tenn., 42 S. W. Rep. 37.

35. INJUNCTION—Marching on Highway — Intimidating Employees.—An injunction was granted and served on defendants, restraining them and all others from in any way interfering with the management, opera-

tion, or conducting of the mines named in the bill, either by menaces, threats, or intimidation of any character used to prevent the employees of said mines from going to or from the same, or from engaging in their usual business or mining. Defendants joined a body of over 200 striking miners in marching, with music and banners, past one of said mines and the homes of the miners working therein, marching and countermarching for three days along the public highway between the mine and the homes of the miners, halting in front of the mine, and taking positions on each side of the road which the miners must cross in going to and from the mine, before daylight and late at night, at the time when such miners were going to and from their work. The avowed object of the strikers was to influence the miners to join in the strike, and this marching and halting in front of the mine were with the evident intent to accomplish this object by intimidation, and some of the miners were thereby intimidated and kept away from their work: Held, that defendants were guilty of contempt.—MACKALL V. RATCHFORD, U. S. C. C., D. (W. Va.), 82 Fed. Rep. 41.

36. INJUNCTION — Pleading.—A right dependent upon present ownership of a fee is not pleaded by alleging an ownership at a time past.—ERWIN V. CENTRAL UNION TEL. CO., Ind., 47 N. E. Rep. 663.

37. INSOLVENCY—Collateral Security.—One to whom a claim is assigned as collateral security is, on the claim being paid, entitled to receive the money, the debt for which the collateral was given not having been paid, even if it was not due.—TODD V. MEDING, N. J., 38 Atl. Rep. 349.

38. INSURANCE — Incumbrances — Representations.—Upon the question of misrepresentation as to incumbrances in an application for additional insurance, the old application, showing that an incumbrance existed, having been filled out by the company's secretary, who made out the new one, is admissible to show that the company knew of the incumbrance.—RAYMOND V. FARMERS' MUT. FIRE INS. CO. OF MECOSTA COUNTY, Mich., 72 N. W. Rep. 254.

39. JUDGMENT — Default — Unliquidated Money Demand.—Default judgment on an unliquidated money demand being authorized by Code, § 267, without verdict, only where an itemized account duly verified is served with the summons and complaint, should be vacated on motion, the record showing that the itemized account annexed to the complaint, and in terms made a part thereof, which was served on defendant, was unverified; and it is immaterial that there was found unexplained in the judgment roll a separate unattached paper, purporting to be an itemized account, duly verified.—ROBERTS V. PAWLEY, S. Car., 27 S. E. Rep. 913.

40. LIMITATIONS—Application to State.—The exemption furnished the State by Rev. St. 1894, § 305 (Rev. St. 1881, § 304), providing that "limitation of action shall not bar the State," etc., applies only when the action is by the State in its own interest. An action by the State to recover a penalty for false returns in tax lists, as provided by Burns' Rev. St. 1894, § 8465, is an action in the interest of the State, although it is commenced on relation of the prosecuting attorney, and the proceeds of the suit are payable into the county treasury.—STATE V. HALTER, Ind., 47 N. E. Rep. 665.

41. MANDAMUS — Allowance of Amendment. — *Mandamus* will not lie to review the action of a court below in permitting an amendment which changes the issue in the cause, when such action may be reviewed on error. — ST. CLAIR TUNNEL CO. V. ST. CLAIR CIRCUIT JUDGE, Mich., 72 N. W. Rep. 249.

42. MARRIAGE—Breach of Marriage Promise—Aggravation.—If a man forms a marriage engagement merely as a cloak to accomplish the woman's seduction, this may be considered in aggravation of damages for the subsequent unjustifiable breach of the contract by him, although the seduction be not accomplished.—KAUFMAN V. FYE, Tenn., 42 S. W. Rep. 25.

43. MASTER AND SERVANT — Death of Employee—Evidence.—In an action against a mining company for the death of a miner killed by falling walls, it was error to admit in evidence the statements of the "underground captain" of the mine, who had charge of the men, made as a witness at the coroner's inquest on the body of deceased, tending to prove the substantive fact that such captain knew the mine was in a dangerous condition when he ordered the men in, and not offered for the purpose of impeaching him. — ANDREWS V. TAMARACK MIN. CO., Mich., 72 N. W. Rep. 242.

44. MASTER AND SERVANT — Injury—Aider by Verdict.—A complaint in an action for personal injuries, alleging that plaintiff, acting under orders of defendant, was injured by an incompetent follow-servant, whose incompetency was known to defendant, but not known to plaintiff, is cured by verdict, though the material averments were defectively made, and it was not stated in what manner the incompetency of the fellow-servant appeared. — INDIANAPOLIS FROG & SWITCH CO. V. BOYLE, Ind., 47 N. E. Rep. 690.

45. MECHANICS' LIENS — Collateral Security—Waiver of Lien.—Where one entitled to a mechanic's lien on gas works accepted, as collateral for a part of his claim, mortgage bonds of the gas company, purporting to be secured by a first lien on the property, he is presumed to have waived the lien to that extent, but not as to the unsecured portion of the debt.—BRISTOL-GOODSON, ETC. CO. V. BRISTOL, ETC. CO., Tenn., 42 S. W. Rep. 19.

46. MINES AND MINING — Patented Claims. — When a patent describes a claim as having parallel end lines, and grants extralateral rights, the courts are bound by the terms thereof, in a controversy with the owners of an adjoining claim, and cannot deny such extralateral rights on the theory that the end lines are not in fact parallel.—WATERLOO MIN. CO. V. DOE, U. S. C. C. of App., Ninth Circuit, 82 Fed. Rep. 45.

47. MUNICIPAL CORPORATION — Defective Sidewalks—Notice.—A plank in a sidewalk was split diagonally from one end, the shorter piece running to a point, making it too short to reach both stringers, which were nearly a foot from the edge of the walk. Plaintiff's companion stepped on the projecting end of the plank, which flew up, causing plaintiff to trip and fall. It was shown that the plank had been loose for a month prior to the accident, and had tripped one of the witnesses before, and several testified that the split was plainly visible: Held, that the question whether the city had notice of the defect should have been left to the jury. — MENARD V. CITY OF BAY CITY, Mich., 72 N. W. Rep. 231.

48. NEGLIGENCE—Presumption — Contributory Negligence.—Where the nature of an accident discloses that an injury to a passenger might as well have happened through his own negligence as that of the common carrier, the fact of the injury raises no presumption that the carrier was negligent.—DRESSLAR V. CITIZENS' ST. R. CO., Ind., 47 N. E. Rep. 651.

49. PARTNERSHIP — Assignments. — A firm dissolved partnership, and one of the partners retired, severing all connection with the firm, although allowing the firm name to remain unchanged. He also relinquished all claim on his share of the capital, which was to remain in the business until a certain date, in favor of a third person. The firm made an assignment before that time: Held, that the third person, claiming through the retired partner, could not prove her claim in competition with firm creditors. — GARLICK V. KARGER, Wis., 72 N. W. Rep. 223.

50. PRINCIPAL AND AGENT — Personal Liability.—One who, as agent, assumes to represent a principal who has no legal existence or *status*, is himself liable.—LEARN V. UPSTILL, Neb., 72 N. W. Rep. 213.

51. PRINCIPAL AND SURETY — Rights Inter Se.—A complaint alleging that plaintiff's ward, as surety with defendant's decedent and another on certain notes, was compelled to pay such notes, and that the maker and

the other surety were insolvent, and asking that the estate of decedent contribute one-half of the amount so paid, set up a valid cause of action. — WINDLE v. WILLIAMS, Ind., 47 N. E. Rep. 680.

52. RAILROAD COMPANY—Contributory Negligence.—In case of collision at a crossing between an engine and a bicycle, resulting in death of the rider of the latter, the question of his contributory negligence is for the jury, though it appears that he was riding about as fast as an ordinary horse trots, and that he did not stop as he approached the crossing; no one having testified whether he did or did not look or listen, the approach along the highway for a distance of 300 feet from the crossing being through a cut with sides 10 to 15 feet high, so that one had to be within 25 feet of the crossing to see an engine 21 feet from the crossing, no notice having been given of the approaching engine, though an electric gong was fixed on the track to ring while a train was within 300 yards of the crossing, and persons who were within a few feet of the crossing having testified that they did not hear the engine till just as it struck deceased. — KIMBALL v. FRIEND'S ADMX., Va., 27 S. E. Rep. 901.

53. RAILROAD COMPANY — Contributory Negligence.—Where a railroad company temporarily obstructs the view of its tracks by leaving freight cars on side tracks, and a train strikes one attempting to go over a crossing in a populous part of a city, the question as to whether the company was negligent in not providing some method for giving notice of the approach of the trains should be submitted to the jury.—WILLET v. MICHIGAN CENT. R. Co., Mich., 72 N. W. Rep. 260.

54. RECEIVERS—Contracts—Liability of Trust Property.—The receiver of a manufacturing corporation, who was authorized to continue the business, contracted for a period of 10 months in advance, without the sanction of the court, for materials for use in carrying on such business, to be delivered on notice by him, a part of which he received and paid for. He refused to accept the balance, and was discharged from his trust without having reported such contract to the court. In an action against the corporation for damages, there was evidence that the quantity of materials contracted for was greater than could be used within the time named, and that it could have been purchased at a price less than that contracted for if it had been ordered as used: Held, that the trial court was invested with the discretion to allow or disallow such claim for damages.—BRUNNER, MONDS & CO. v. CENTRAL GLASS CO., Ind., 47 N. E. Rep. 686.

55. REPLEVIN—Sufficiency of Complaint.—A petition in replevin by a mortgagee of chattels, alleging that the plaintiff has a special interest in the property by virtue of a chattel mortgage, and that he is entitled to the immediate possession of such property, without alleging the facts in reference to his special ownership, and the facts showing his right to the possession of the mortgaged property, does not state a cause of action.—J. THOMPSON & SONS' MANUFG. CO. v. NICHOLLS, Neb., 72 N. W. Rep. 217.

56. SALE—Action for Price.—In an action to recover the price of a motor, an answer alleging that the machine was sold to defendant for the special purpose of operating a feed cutter, but that, after it was erected, and after a fair and thorough trial, it wholly failed to fulfill such purpose; that plaintiff's agent was unable to make it perform the expected work, and was informed that it was not accepted; and that said motor was of no value whatever, etc., without specifying any defect therein, or averring in what manner it failed to work, is insufficient.—AERMOTOR CO. v. EARL, Ind., 47 N. E. Rep. 685.

57. SALES—Fraud.—The mere fact that an insolvent debtor sells his entire stock of goods for an appreciable amount less than their real value does not necessarily prove fraud, but may be considered by the jury as evidence of fraud on the part of the purchaser, on behalf of those who sold said goods to said debtor on credit.—SCHLOSS v. ESTEY, Mich., 72 N. W. Rep. 264.

58. TAXATION—Wrongful Sale — Parties.—An action against a county treasurer and his sureties for the wrongful sale of property for taxes is properly brought in the name of the person to whom the certificates of tax sale and treasurer's deed were issued and the money invested belonged.—ALEXANDER v. OVERTON, Neb., 72 N. W. Rep. 212.

59. TAX DEED — Validity.—A tax deed based on an assessment not containing a description of the property conveyed no title.—PETIT v. FLINT & P. M. R. CO., Mich., 72 N. W. Rep. 238.

60. TRADE-NAMES—Use of Similar Name—Injunction.—A corporation is not entitled to an injunction restraining another corporation from using the same corporate name, or from publishing a periodical having a name similar to one published by complainant, where defendant is incorporated, and its paper published in a State distant from complainant, and the names are used with distinguishing characteristics which render injury to complainant therefrom improbable, in the absence of proof that such injury has actually resulted.—INVESTOR PUB. CO. OF MASSACHUSETTS v. DOBINSON, U. S. C. C., S. D. (Cal.), 83 Fed. Rep. 57.

61. TRIAL—Competency of Juror.—That a person who is tendered as a petit juror states that he has formed or expressed an opinion with regard to the guilt or innocence of an accused, from a conversation held with his brother, who was a member of the jury who previously tried and convicted him on the same indictment, is not disqualifying, as the information thus imparted was hearsay merely.—STATE v. WILLIAMS, La., 22 South. Rep. 759.

62. TRIAL—Right to Jury Trial.—Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averments of the petition, and, in case of ambiguity, by resort to the prayer.—YAGER v. EXCHANGE NAT. BANK OF HASTINGS, Neb., 72 N. W. Rep. 211.

63. TRUSTS—Control of Trust Fund.—That a trustee, after the creation of the trust, has removed from the State, is sufficient to deprive her of the custody of the trust fund; unless she executes a sufficient bond, to be approved by one of the masters, with sureties amenable to the jurisdiction of the court, conditioned for the discharge of her duties, and that she will not remove the trust fund beyond the jurisdiction, and will account regularly for the same.—CARR v. BERDENBERG, S. Car., 27 S. E. Rep. 925.

64. TRUST—Resulting Trusts—Evidence.—Where one holding trust funds purchased real estate with a portion thereof, for the beneficiaries, and placed them in possession, but took the title in his own name, without their knowledge, merely as a matter of convenience, a trust resulted.—WOLFE v. CITIZENS' BANK OF ROGERSVILLE, Tenn., 42 S. W. Rep. 89.

65. WATER COURSES—Pollution.—One who sinks an artesian well on his own land, and uses the water to bathe the patients in a sanitarium erected by him on said premises, is not liable to injunction and damages for allowing the water, after such use, to flow into a stream which crosses the land of an adjoining owner, and is the only natural and available outlet.—BARNARD v. SHIRLEY, Ind., 47 N. E. Rep. 671.

66. WATERS—Drains.—When the line of a ditch established under Burns' Rev. St. 1894, §§ 5658, 5668 (Rev. St. 1881, §§ 4285, 4317), is changed on the lands of any one or more persons by agreement with the county surveyor, those owning land on the line of the ditch above the point where the change is made cannot complain, if their lands receive as good drainage as the ditch completed on the established line would give.—COOPER v. SHAW, Ind., 47 N. E. Rep. 679.

67. WITNESSES — Impeachment.—When a party becomes a witness in his own behalf, the cross-examiner may question him as to antecedents and character, as affecting his credibility.—GEORGIA v. BOND, Mich., 71 N. W. Rep. 232.